United States Court of Appeals

for the Second Circuit

APPENDIX

75-7159

United States Court of Appeals

FOR THE SECOND CIRCUIT

NO. 75-7159

INTERNATIONAL ELECTRONICS CORPORATION
and ELECTRO MOTIVE CORPORATION,

Plaintiffs

vs.

JOSEPH FLANZER, JULIUS APTER, JOHN SINDER,
SAUL LEWIS, IRVING BEIN, PHILIP BEIN
and J. KEVIN FOLEY;
JULIUS APTER, MORRIS APTER and NICHOLAS A. LENGE,
d/b/a APTER, NAHUM & LENGE,

Defendants

APPEAL FROM UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOINT APPENDIX

MORRIS APTER, ESQ.
ARNOLD E. BUCHMAN, ESQ.
101 PEARL STREET
HARTFORD, CONNECTICUT 06103
Attorneys for Appellants

APPENDIX

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*Designated by the Appellee for inclusion.

MOTION TO DISQUALIFY COUNSEL

Defendants Joseph Flanzer, Julius Apter, John Sinder, Saul Lewis, Irving Bein, Philip Bein, Morris Apter and Nicholas A. Lenge move that J. Read Murphy, Esq. and any member or associate of his firm, Murtha, Cullina, Richter and Pinney, of Hartford, Connecticut, be disqualified from acting as counsel for the Plaintiffs because such representation is in violation of the Code of Professional Responsibility and the Local Rules of Procedure of this Court (Rule 2f).

Dated at Hartford, Connecticut, this 1st day of October, 1974.

DEFENDANTS

By ______________________
Morris Apter

By ______________________
Arnold E. Buchman

MOTION TO DISQUALIFY MORRIS APTER, ARNOLD E. BUCHMAN, OR ANY MEMBER OF THE FIRM OF APTER, NAHUM & LENGE FROM REPRESENTATION OF ANY OF THE DEFENDANTS

Plaintiffs move the Court for an order disqualifying Morris Apter, Arnold E. Buchman, or any member of the firm of Apter, Nahum & Lenge from continued representation of any of the defendants in this case. (The defendant J. Kevin Foley is represented by Edward F. Hennessey, Esq., and no issue is raised as to Mr. Hennessey.)

The reasons for this motion are as follows:

1. The defendant Julius Apter is a law partner of Messrs. Morris Apter and Arnold E. Buchman, and of the firm of Apter, Nahum & Lenge.

2. The principal action is brought by the plaintiffs charging the defendants with vi lation of the federal Securities Exchange Acts and common law fraud and misrepresentation.

3. The transaction giving rise to this action was the sale of the stock of the former Electro Motive Manufacturing Company by these defendants principally, to the plaintiff IEC Corporation.

the only then existing labor problems was prepared under

Electro Motive stock and the price realized by Mr. Apter was $194,670.90, of which approximately $28,417.30 is involved in the escrow fund referred to in paragraph 22 of the THIRD COUNT of the Complaint.

5. The negotiations leading to this transaction were carried on for the defendants and the other stockholders of Electro Motive primarily by Mr. Apter in his capacity as attorney for, director, assistant secretary and stockholder of Electro Motive.

6. Mr. Julius Apter's law firm, by acting as counsel for him and the other defendants violates Disciplinary Rules 5-101(B) and 5-102(A) of the Code of Professional Responsibility of the American Bar Association in that Mr. Apter is a material witness who will have to be called by the defendants in their defense of this case.

7. The firm of Apter, Nahum & Lenge was named as defendant solely because said firm was an escrowee as described in paragraph 22 of THIRD COUNT of the Complaint. Notwithstanding, said firm has counterclaimed for alleged promises of legal fees incurred in the sale of Electro Motive and for services rendered to said corporation prior to the date of sale.

8. Any negotiations carried on with respect to said fees would also involve the testimony of Mr. Julius Apter.

9. Both Messrs. Apter, and Mr. Buchman have a direct financial interest in the outcome of the litigation, Mr. Julius Apter in his capacity as a stockholder of the old Electro Motive Manufacturing Company and as a partner in the law firm, and Messrs. Morris Apter and Buchman as members of the law firm under the counterclaim. This is in violation of Disciplinary Rule 5-105(A) and (B).

10. The representation of a firm and one of its individual partners by that firm's other partners is unethical and not conducive to the best interests of the bar and its public image. This point acquires greater emphasis where, as here, the defendant Foley has claimed the case to a jury.

Respectfully submitted

J. Read Murphy
Attorney for Plaintiffs
Murtha, Cullina, Richter and Pinney
P. O. Box 3197 - 101 Pearl Street
Hartford, Connecticut 06103

AFFIDAVIT

State of Florida)
) ss. Town of Hallandale October 10 , 1974
County of Broward)

Personally appeared JULIUS APTER of the Town of Hallandale who, being duly sworn, deposes and says:

1. He is afflicted with an eye condition which has substantially impaired his vision and has rendered him unable to read. The condition is more fully described in the affidavit of Louis D. Harris, M. D.

2. As a result of his eye condition, he has not engaged in the practice of law since January 1974, and had practiced law only on a limited basis for some months prior thereto.

3. He has retired from the practice of law and the law firm of Apter, Nahum & Lenge, no longer occupies office space with that firm, and does not intend to resume practice or renew his license to practice law in Connecticut.

4. He has no abode in the State of Connecticut and has established residence in the State of Florida.

5. He has not acted as counsel, prepared pleadings, advised or consulted as to the law or in any way participated in this lawsuit other than as a party defendant.

6. He does not make claim to or expect or anticipate any participation in fees which may be earned by Apter, Nahum & Lenge for professional services rendered or to be rendered in connection with this lawsuit.

7. This affidavit was read to him prior to its execution.

Julius Apter

Julius Apter

AFFIDAVIT

State of Connecticut)
) ss. Town of Hartford October 1, 1974
County of Hartford)

Personally appeared MORRIS APTER, of the Town of Hartford, who, being duly sworn, deposes and says:

1. I am an attorney at law and authorized to practice before the Courts of the State of Connecticut and the United States District Court for the District of Connecticut.

2. I am co-Executor under the Will of Samuel Roskin, deceased, late of West Hartford, and, as such, was appointed by the Probate Court for the District of Hartford on April 9, 1974.

3. Donald P. Richter, Esq., a partner of the firm of Murtha, Cullina, Richter and Pinney in which counsel for the Plaintiffs, J. Read Murphy, Esq. is likewise a partner, was retained as attorney to represent me and the other co-Executors under said Will on or about April 2, 1974, and has filed his appearance for the Executors in said Probate Court.

4. I am Defendant in the above entitled case which was instituted by complaint signed by said J. Read Murphy, Esq.

Morris Apter

AFFIDAVIT

State of Connecticut)
) ss. Town of Hartford October 8 , 1974
County of Hartford)

Personally appeared LOUIS D. HARRIS of the Town of West Hartford, who, being duly sworn, deposes and says:

1. I am a physician and for many years have been engaged in the practice of Opthalomolgy in Hartford, Connecticut.

2. On January 3, 1974 and again on June 11, 1974 I examined Julius Apter of the Town of Bloomfield, Connecticut for the purpose of treating him for an opthalmic condition.

3. On each occasion, I found that Mr. Apter has a senile macular choroidal degeneration of both eyes, and the visual acuity of both eyes does not exceed 20/200 with correcting lenses and, therefore, consider him to be blind as defined by the Statutes of the State of Connecticut.

4. I referred Mr. Apter for further diagnosis to Yale Opthalmic Consultants of New Haven, Connecticut and to Retina Associates of Boston, Massachusetts and attached hereto are copies of their reports concerning their examinations of him.

Louis D. Harris

Louis D. Harris

AFFIDAVIT

I, DONALD P. RICHTER, of Manchester, Connecticut, being deposed, state as follows:

1. I am an attorney at law, and a partner of the firm of Murtha, Cullina, Richter and Pinney, practicing at 101 Pearl Street, Hartford, Connecticut, and was so engaged for all the period referred to below.

2. From time to time over a number of years prior to 1973 one of the other partners of this firm or I had been consulted professionally by and had performed legal services for Samuel Roskin, late of West Hartford, Connecticut.

3. In 1973 Laurence J. Ackerman, a close personal friend of Mr. Roskin, and Robert Siskin, C.P.A., senior partner of the accounting firm which acted as auditors for the "Roskin Corporations", conferred with me on several occasions, including more than one occasion when Mr. Roskin was present. The conferences focused upon Mr. Roskin's Estate Planning, with particular reference to the drafting of appropriate wills and trusts for him and laying plans for the disposition prior to his death of his substantial stock interest in the several "Roskin Corporations."

4. In 1973, as a result of the conferences referred to in the preceding paragraph and utilizing information that I had garnered in representing Mr. Roskin from time to time during the prior period I drew a new Will and First Codicil thereto for Mr. Roskin, together with a comprehensive First Amendment to his 1967 Life Insurance Trust Agreement which I had drawn and which was executed in the office of my firm.

5. Also during the latter part of 1973 I was deeply engaged, together with Laurence J. Ackerman, in attempting to negotiate the sale by Mr. Roskin during his lifetime of his substantial stock interests in the "Roskin Corporations." The negotiations culminated in an agreement in principle and a preliminary draft of a document which Mr. Roskin signed in Florida a few weeks before he died on March 26, 1974.

6. Attorney Morris Apter was not engaged with me and Mr. Ackerman in our above-described negotiating efforts.

7. As Mr. Roskin's health failed seriously in the late winter of 1974, while at the same time the negotiations looking toward the sale of his substantial stock interests in the "Roskin Corporations" were proceeding under the direction of Mr. Ackerman and myself, it is my distinct recollection that those persons who were most interested assumed that when Mr. Roskin's death occurred I would in fact be expected to continue to represent his Estate. The "persons" referred to in the preceding sentence included in addition to Messrs. Ackerman and Siskin, Mr. Roskin's son, Joel, and Mr. Roskin himself.

changes in financial condition for each of the years then ended.

8. Mr. Roskin died on March 26, 1974 at a time when a great deal of additional and complicated work had to be performed to effectuate the necessary sale of Mr. Roskin's substantial stock interest in the "Roskin Corporations." (Indeed, that sale was not closed until December 16, 1974.)

9. Shortly after Mr. Roskin's death, I was instructed by one or more of Messrs. Ackerman, Siskin and Mr. Roskin's sole heir, his son, Joel, to proceed to take whatever steps were necessary to represent his Estate and the Executors named in Mr. Roskin's Will, namely, Laurence J. Ackerman, Esq., Robert Siskin C.P.A., and .orris Apter, Esq. At about this time there was delivered a certain letter signed by Mr. Roskin in which he stated his desire that I act as attorney for his Estate, which desire he had expressed to me personally several months before he died in the presence of his son, Joel.

10. As indicated by the fact that the closing on the sale of the "Roskin Corporations" took place on December 16, 1974, I have been actively involved on behalf of the subject estate since the date of Mr. Roskin's death in a general capacity and especially on behalf of the Estate with respect to said sale.

11. Except as it may be inferred from the fact that Attorney Apter concurred in my selection as counsel for the Estate, I was not retained by him.

12. My professional activity respecting Attorney Apter has been confined to his fiduciary status as one of three named Executors. At no time have I ever performed any professional services for Attorney Apter in any other capacity.

13. Never having performed any professional services for Attorney Apter personally, I, of course, have never rendered a statement to him for services nor expected any payment from him personally. My professional services were and have been rendered on behalf of the Estate of Samuel Roskin, for which services the law firm of which I am a partner will render a statement addressed to the Estate, which statement will be paid from the resources of the Estate.

Dated at Hartford, Connecticut, this 23rd day of December, 1974.

Donald P. Richter

DONALD D. SHACK, being duly sworn, deposes and says:

1. I am a member of the New York law firm of Golenbock and Barell, which serves as general counsel to plaintiffs International Electronics Corporation ("IEC") and Electro Motive Corporation. I am also a Director and Secretary of both IEC and Electro Motive Corporation. This affidavit is respectfully submitted in support of plaintiffs' motion for an order, pursuant to Canon 5 of the Code of Professional Responsibility, disqualifying Morris Apter, Arnold E. Buchman, or any member of the firm of Apter, Nahum & Lenge from continued representation of any of the defendants in this case. As counsel to IEC I participated in the negotiations which led to the consummation of the transaction which is the subject matter of

on the Balance Sheet and all property and assets acquired since

this lawsuit and am personally familiar with the facts set forth below.

2. At the outset, let me state that the plaintiffs had earnestly hoped to avoid burdening this Court with the instant motion. When counsel for plaintiffs, Mr. Murphy, informed me that Apter, Nahum & Lenge had appeared as counsel for the defendants, I felt it incumbent upon myself to bring the facts set forth herein to the attention of Mr. Murphy and through him to Mr. Apter so as to give Mr. Apter an opportunity to voluntarily remove himself and his firm as counsel in this lawsuit and thus obviate the necessity for his firm's disqualification in this action. It was only after Mr. Apter refused to have his firm withdraw and insisted that this matter be brought before this Court by formal motion that plaintiffs proceeded with this motion.

3. As will be demonstrated herein, and in the accompanying memorandum of law, the Apter firm's continued representation of the defendants in this action is in direct contravention and in violation of Canon 5 of the Code of Professional Responsibility and the Ethical Considerations and Disciplinary Rules therein, in that, among other things, Julius Apter, Esq., a member of Apter, Nahum & Lenge, attorneys for certain defendants, was himself one of the selling stockholders in the subject securities transaction alleged to be violative of the anti-fraud provisions of the Federal Securities Laws. Mr. Apter has already received $194,670.90 in respect of his sale of stock and has a proportionate interest in the $1,026,740.92 escrow fund referred to in paragraph 4 below. In addition, he represented himself

or contract for services, material, supplies or equipment or for

and other selling shareholders in the transaction and participated in the negotiations and drafting of the various selling documents. He has, I believe personal knowledge of the representations and omissions of material fact alleged in the complaint. He may well be called by defendants as material witness both in their defense of this case and in support of their counterclaims and as a party is, of course, subject to pre-trial deposition. In addition, Mr. Apter has a substantial financial interest in the outcome of this litigation, and given his active role in the transaction may have an interest at variance with other selling stockholders, including the individual defendants he represents, who played a more passive role. Moreover, Apter, Nahum & Lenge are co-escrow agents for an escrow fund of $1,026,740.92, in which all selling stockholders, including Mr. Apter, are interested. The potential, if not actual conflict, inherent in this situation is clear.

BACKGROUND FACTS GIVING RISE TO THE INSTANT MOTION

4. This action finds its genesis in the merger of The Electro Motive Manufacturing Company, Incorporated ("ELMENCO") into IECONN, Inc. ("IECONN"), which thereafter changed its name to Electro Motive Corporation, one of the plaintiffs at bar. In consideration of the merger, IECONN paid to the shareholders of ELMENCO for all of their outstanding shares an aggregate of $7,033,623.33 of which $194,670.90 went to Apter individually. In addition, IECONN paid into an Escrow Fund the sum of $1,026,740.92 of which

business, operations or financial condition of ELMENCO or any

$28,417.30 plus accured interest is applicable to Mr. Apter's stock. Upon the happening of certain conditions not material here, this fund was to be paid to the selling stockholders, including Apter. The individual defendants including Apter, were the principal selling stockholders of ELMENCO. The firm of Apter, Nahum & Lenge is named as a defendant because they are co-agents for the Escrow Account established pursuant to the terms of the Agreement and Plan of Merger.

5. This action was commenced by the filing of a complaint on or about June 6, 1974 and charges the individual defendants with material misrepresentations and omissions of fact in connection with the Agreement and Plan of Merger in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)(5) promulgated thereunder. The complaint also charges the defendants with common law fraud and misrepresentation. Plaintiffs seek damages in an amount in excess of $2,000,000. The defendants represented by the Apter firm have filed a counterclaim alleging that plaintiffs and their chief executive officer, Benjamin Grossman, in the negotiations leading to the merger participated in a device scheme and artifice to defraud.

6. My firm served as counsel to IEC throughout the negotiations leading to the consummation of the merger. I was the partner directly responsible for this matter on behalf of my firm. The selling stockholder defendants and ELMENCO were at all times represented by the firm of Apter, Nahum & Lenge. The various parties to the merger included IEC and its wholly-owned subsidiary INCOM, ELMENCO, the

stockholders of ELMENCO and the Joseph E. Lauter Greer and Phillip Lauter Foundation, Incorporation, a principal creditor of ELMENCO, which was required to consent to modify its loan obligation as a condition of the merger. Mr. Apter was a member of the firm of Apter, Nahum & Lenge which served as counsel to ELMENCO, to the stockholders and to the Foundation. Mr. Apter also served in his individual capacity as a trustee of the Foundation, as a principal selling stockholder and as a director and officer of ELMENCO. In addition, Mr. Apter served as sole trustee for seven trusts which were selling stockholders. Mr. Apter participated in all the negotiations and in the drafting of the pertinent documents, including the required representations.

7. Specifically, Mr. Apter and I negotiated, line by line, the Agreement and Plan of Merger ("the Agreement") signed by the parties. (A conformed copy of the Agreement is annexed as Exhibit A). It is this Agreement, among other things, which evidences certain of the misrepresentations and omissions of material facts alleged to violate the Federal Securities Laws and State common law. Thus Mr. Apter, wearing all of the various hats described in the previous paragraph participated in the meetings and negotiations which give rise to the following alleged misrepresentations and/or omissions which form the basis for plaintiffs' complaint:

(a) It was represented that there were no threats of any strikes, demands for collective bargaining by or disputes or controverses with any union or other labor organization against or including ELMENCO or any of its

1.21 No representation or warranty hereunder, and subsidiaries except as set forth in Schedule 1.19 to the Agreement (Exhibit B). (Compl. par. 13(a)). Indeed, Schedule 1.19 to the Agreement (Exhibit B) which purportedly lists the only then existing labor problems was prepared under Mr. Apter's supervision and initiated by him. The complaint alleges the existence of other labor problems which defendants failed to disclose.

(b) It was represented that there had been no material adverse change in the financial condition, assets, liabilities, properties or business of ELMENCO (Compl. par. 13(b)). The complaint alleges that prior to the consummation of the merger, there had been material adverse changes in the financial condition and business of ELMENCO.

(c) It was represented that between the date of the Agreement (April 19, 1973) and the effective date of the merger (July 27, 1973), ELMENCO and its subsidiaries would conduct their business in the usual and ordinary manner (Compl. par. 13(c)). The complaint alleges that without plaintiff's knowledge or consent defendants engaged in a course of conduct not within the usual and ordinary course of business.

(d) The complaint also alleges misrepresentations concerning ELMENCO's financial condition (Compl. par. 13(d)).

Mr. Apter purported to carefully and specifically negotiate the Agreement which contains these alleged misrepresentations and omissions.

8. Beginning in early 1973 until the closing of the transaction at the end of July, I was in regular and continuous contact with Julius Apter and we spent an extensive amount of time on the transaction with Mr. Apter performing all of the duties required of him in his various capacities as a party and as an attorney.

9. It is clear that Mr. Apter, who possesses intimate knowledge of the relevant facts may be called as a material witness at the trial of this action, not only in defense of plaintiffs' claims, but also in support of the counterclaims alleged by defendants. Thus, defendants representation by Mr. Apter's law firm, Apter, Nahum & Lenge, is in direct contravention of Canon 5 of the Code of Professional Responsibility and more specifically Ethical Consideration 5-9 and 5-10 and Disciplinary Rules 5-101 and 5-102 promulgated thereunder. As more fully explained in the accompanying memorandum of law, these rules, dealing with the situation where an attorney is also a witness, prohibit the attorney from undertaking employment in a contemplated or pending litigation if "he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness." It does not require extended argument to conclude that Mr. Apter's multifaceted participation in the Agreement and Plan of Merger, as attorney, director, officer, trustee, selling stockholder, and escrow agent make him a person who "ought to be called as a witness" at the trial of this action. Mr. Apter's participation as both counsel for the defendants and a witness is all the more troublesome in that his personal and [illegible] in the negotiations may place greater

culpability upon him than on selling stockholders who played a more passive role in this transaction.

10. Julius Apter's significant financial interest is yet another reason mandating disqualification. Mr. Apter as the former owner of 107 shares ELMENCO realized as discussed above more than $200,000 from the sale of his ELMENCO stock. As set forth more fully in the accompanying memorandum of law, Canon 5 of the Code of Professional Responsibility and the Ethical Considerations and Disciplinary Rules therein prohibit an attorney from accepting employment where he has a personal or financial interest in the outcome of the litigation. The potential for a disturbing conflict of interest is underscored when one notes the possibility of disputes among the passive and active with respect to liability under the Federal Securities Laws.

11. It is respectfully submitted that the totality of the circumstances at bar mandate the disqualification of the firm of Apter, Nahum & Lenge. To permit that firm to continue to act as counsel, based on the facts before this Court is contrary to the clear language of the Code of Professional Responsibility and is against sound public policy.

Donald D. Shack

DONALD D. SHACK

AGREEMENT AND PLAN OF MERGER

AGREEMENT AND PLAN OF MERGER, dated as of April 19, 1973, between IECONN, INC., a Connecticut corporation ("IECONN"), and The Electro Motive Manufacturing Company, Incorporated, a Connecticut corporation ("Elmenco"), IECONN and Elmenco being hereinafter sometimes called the "Constituent Corporations", and joined in by International Electronics Corporation, a New York corporation ("IEC"), the sole stockholder of IECONN.

W I T N E S S E T H:

WHEREAS, the Boards of Directors of IECONN, Elmenco and IEC deem the merger of Elmenco into IECONN on the terms herein set forth to be desirable and in the best interests of their respective stockholders, have approved this Agreement and Plan of Merger (hereinafter called the "Agreement") and have directed that the Agreement and the merger contemplated hereby be submitted to their respective stockholders for approval, as necessary.

NOW, THEREFORE, in consideration of the premises and of the mutual representations, warranties, covenants and agreements contained herein, and in accordance with the applicable provisions of law of the State of Connecticut, IECONN, Elmenco and IEC hereby agree that Elmenco shall be merged into IECONN, which shall be the surviving corporation, and that the plan, terms and conditions of such merger shall be as follows:

1. Representations and Warranties of Elmenco

Elmenco represents and warrants as follows:

1.1 Elmenco is a corporation duly organized, validly existing and in good standing under the laws of the

State of Connecticut and has full power and authority to own its properties and carry on its business as and in the places where such properties are now owned or such business is now being conducted. Elmenco is duly qualified to do business and is in good standing in each jurisdiction in which the character of the properties owned by it or the nature of the business transacted by it makes such qualification necessary.

1.2 Elmenco has no subsidiaries except Jay's Realty, Inc. (a South Carolina corporation) and Electro Motive, Ltd. (a Jamaican corporation) (collectively referred to herein as the "Subsidiaries"), and owns no stock in or securities of any other corporation.

1.3 Each Subsidiary is a corporation duly organized, validly existing and in good standing under the laws of its jurisdiction of incorporation and has full power to own its properties and carry on its business as and in the places where such properties are now owned or such business is now being conducted. Each Subsidiary is duly qualified to do business and is in good standing in each jurisdiction in which the character of the properties owned by it or the nature of the business transacted by it makes such qualification necessary.

1.4 The copies of the respective Certificates of Incorporation and By-Laws of Elmenco and each Subsidiary, each as amended to date, which have been made available to IEC and initialed by the parties hereto, and the corporate Minute Books of Elmenco and each of its Subsidiaries, which have been made available to IEC, are complete and correct.

1.5 The execution and delivery of the Agreement have been duly authorized by Elmenco's Board of Directors and when approved by the vote of not less than two-thirds of the outstanding shares of stock of Elmenco, no further corporate action will be necessary on Elmenco's part to constitute the Agreement as the binding and enforceable obligation of Elmenco and its stockholders in accordance with its terms. Except in respect of the requirement to obtain stockholders' consent, there are no corporate, contractual, statutory or other restrictions of any kind upon the power and authority of Elmenco to execute and deliver the Agreement and to consummate the transactions contemplated hereby and the execution and delivery of the Agreement and the consummation of the transaction contemplated hereby do not and will not violate the respective Certificates of Incorporation or By-Laws of Elmenco or any of its Subsidiaries, and will not conflict with or result in any breach of any condition or provisions of, or constitute a default under, or result in the creation or imposition of any lien, charge, or encumbrance upon any of the properties of Elmenco or the Subsidiaries by reason of the terms of any contract, mortgage, lien, lease, agreement, indenture, instrument or judgment to which Elmenco or any of the Subsidiaries is or are a party, or which is or purports to be binding upon Elmenco or the Subsidiaries or any of them or which affects or purports to affect any of the property or assets of Elmenco or the Subsidiaries.

1.6 No action, approval or consent, including, but not limited to, any action, approval or consent by any

federal, state, municipal or other governmental agency, commission, board, bureau, or instrumentality is necessary in order to constitute this Agreement as a valid, binding and enforceable obligation of Elmenco and its stockholders in accordance with its terms.

1.7 The total authorized capital stock of Elmenco consists of 3,879 shares of Common Stock, par value $10.00 per share, of which 3,873 shares are issued and outstanding ("Elmenco Stock"). There exists no option, warrant, convertible security or other right or claim on the part of any person to any shares of Elmenco Stock. All of the issued and outstanding shares of Elmenco Stock are validly issued and outstanding, fully paid and non-assessable.

1.8 The total authorized and outstanding capital stock of each of the Subsidiaries is set forth on Schedule 1.8 annexed hereto and made a part hereof. All of the issued and outstanding stock of each of the Subsidiaries is owned by Elmenco, free and clear of all liens, claims or encumbrances. There exists no option, warrant, convertible security or other right or claim on the part of any person to any capital stock of the Subsidiaries. All of the issued and outstanding stock of the Subsidiaries is validly issued and outstanding, fully paid and non-assessable.

1.9 There are annexed hereto and made a part hereof, as Schedule 1.9, balance sheets of Elmenco and its Subsidiaries as at May 31, 1970, 1971 and 1972 and re-

lated consolidated statements of earning, retained earnings and changes in financial condition for each of the years then ended, certified by Alexander Grant & Company. All of the foregoing financial statements are collectively referred to as the "Financial Statements". The Financial Statements are true and complete and fairly present the financial condition of Elmenco and its Subsidiaries, their respective assets and liabilities and results of operations as at the dates and for the periods indicated in accordance with generally accepted accounting principles consistently applied. The May 31, 1972 balance sheet (the "Balance Sheet") presents a true and complete statement at May 31, 1972 of all of the assets and all of the liabilities, absolute or contingent, of Elmenco and the Subsidiaries, including, without limitation, liabilities for federal, state and local taxes. The assets as stated therein have a minimum value substantially equal to the value shown for such assets. At May 31, 1972 neither Elmenco nor any Subsidiary had any liabilities or obligations of any kind, absolute or contingent, which are not reflected on the Balance Sheet. It shall not be a breach of this representation if items of expense not exceeding $10,000 per annum are required to be capitalized so long as such capitalized items are depreciable for tax purposes. IECONN and IEC acknowledge and agree that the method and valuation of inventory on the Financial Statements is correct and that IECONN and IEC shall not make any claim that any inventory should have been valued on a different basis or in any different amount.

1.10 Since May 31, 1972, there has been no material adverse change in the financial condition, assets, liabilities, properties or business of Elmenco or any Subsidiary or the title of Elmenco or any Subsidiary to any of its respective properties or assets and, except as set forth in Schedule 1.10, neither Elmenco nor any Subsidiary has

1.10.1 issued or sold any stock, notes, bonds, or other corporate securities, or any option to purchase the same, or entered into any agreement with respect thereto;

1.10.2 except for regular quarterly dividends of $3.00 per share, declared, set aside or made any dividend or other distribution on its capital stock or redeemed, purchased or acquired any shares thereof or entered into any agreement in respect of the foregoing;

1.10.3 incurred or paid any obligation or liability (absolute or contingent), except current liabilities and obligations incurred or paid in the ordinary course of business;

1.10.4 incurred any damage, destruction or similar loss, whether or not covered by insurance, materially affecting its business or property;

1.10.5 sold, assigned or transferred any of its tangible assets or any patent, trademark, trade name, copyright, license, franchise or other intangible assets or property, except in the ordinary course of business; provided, however, that the representation contained herein shall not be deemed a representation as to ownership by Elmenco of any specific patent, trademark, trade name, copyright, license or franchise;

1.10.6 mortgaged, pledged or granted or suffered to exist any lien or other encumbrance or charge on any of its assets or properties, tangible or intangible;

1.10.7 waived any rights of any value or cancelled any debts or claims;

1.10.8 made any changes in compensation payable to officers or directors or any material increase in compensation payable to other employees;

1.10.9 engaged in any transaction with any of the stockholders of Elmenco, or with any corporation owned or controlled by any of them;

1.10.10 entered into any transaction other than in the ordinary course of business.

1.11 Set forth in Exhibit 1.11 annexed hereto and made a part hereof are photostatic copies of all of the deeds to real property, whether improved, vacant or unimproved, owned or leased (as lessor or lessee) by Elmenco or a Subsidiary or in which Elmenco or a Subsidiary has any other interest. Said list and description includes, without limitation, all buildings, plants and structures located thereon. None of the property referred to in such deeds is in violation of any applicable statute, rule, regulation, law, zoning ordinance, order, or requirement affecting said property and Elmenco has not received notice of any such violation.

1.12 Except as reflected or reserved against in the Balance Sheet, Elmenco and the Subsidiaries have good and marketable title in fee simple absolute to all real property owned by them and good and marketable title to all other property and assets owned by them wherever the same may be located, including without limitation, inventory, machinery,

to Elmenco, dated as of the Effective Date, stating their

equipment, materials and other property of every kind, tangible and intangible, and including all property and assets reflected on the Balance Sheet and all property and assets acquired since May 31, 1972, free and clear of any mortgage, pledge, lien, security interest or other agreement, lease, encumbrance, right, contract or charge of any nature. All buildings and equipment owned or used by Elmenco or a Subsidiary are in operating condition and in a state of maintenance and repair. All inventories reflected in the Balance Sheet and all inventories thereafter acquired are merchantable, have been valued at the lower of cost or fair market value in accordance with generally accepted accounting principles consistently applied, and contain no obsolete or damaged goods except as designated on the inventory records of Elmenco and the Subsidiaries.

1.13 The accounts, notes and sundry receivables reflected in the Balance Sheet and the accounts, notes and sundry receivables acquired since the date thereof are validly created obligations and debts of the respective account debtors and obligors who incurred the same and are owned and held free of all liens, claims, encumbrances and charges thereon.

1.14 Neither Elmenco nor any Subsidiary is a party to or has any contact or commitment of any kind or nature whatsoever, written or oral, including, without limitation, any lease, license, franchise, employment, consultant or commission agreement, or pension, profit-sharing, bonus, stock purchase,

retirement, hospitalization, insurance or other plan or arrangement involving employee benefits, contract with any labor union or contract for services, material, supplies or equipment or for the sale or purchase of any of its products or assets, except for the contracts set forth in Schedule 1.14 annexed hereto and made a part hereof, true copies of each of which have been initialled for Elmenco or for a Subsidiary by a duly authorized officer thereof and delivered to IEC and except for purchase or sale orders executed in the ordinary course of business in amounts less than $1,000. Each of the contracts and commitments referred to herein or in Schedule 1.14 is valid and existing, in full force and effect and enforceable in accordance with its terms and no party thereto is in default and no claim of default by any party has been made or is now pending and there does not exist any event which with notice or the passing of time or both would constitute a default or would excuse performance by any party thereto. Each of such contracts and commitments was made at established market prices at the time made (or if no established market price existed, the same resulted from bona fide arms length negotiations). No stockholder of Elmenco has any interest in any such contract or commitment.

1.15 Schedule 1.15 annexed hereto and made a part hereof is a true and complete list, brief description and schedule of expiration dates of all policies of fire, liability and other forms of insurance owned or held by Elmenco or any Subsidiary. All of such policies are valid and binding and in full force and effect as of the date hereof.

1.16 There are no actions, suits or proceedings or investigations pending or threatened against or affecting the business, operations or financial condition of Elmenco or any Subsidiary, at law or in equity, in any court or before any federal, state, municipal or other governmental department, commission, board, bureau, agency or instrumentality, nor is there any basis for any such action, suit, proceeding or investigation. Neither Elmenco nor the Subsidiaries are in default with respect to any judgment, order, writ, injunction, or decree in any court or before any federal, state, municipal or other governmental department, commission, board, bureau, agency or instrumentality.

1.17 All reports, schedules, registrations and/or returns heretofore required to be filed or made by Elmenco or any Subsidiary with any administrative agency of the federal or any state or local governments have been filed or made. Elmenco has complied with all statutes, regulations, rules and orders of all federal, state, municipal and other governmental departments, commissions, boards, bureaus and agencies relating to or affecting the conduct of their business or the maintenance of their properties, including, without limitation, all statutes, regulations, rules and orders relating to the employment of labor.

1.18 Elmenco and the Subsidiaries have duly filed all federal, state, county and local income, excise and other tax returns and reports required to have been filed up to the date hereof. Elmenco and the Subsidiaries have paid all taxes,

the claim, through ILC's attorney, or an attorney satisfactory

interest and penalties shown on such returns or reports or claimed to be due to any federal, state, county, local or other taxing authority and there is no basis for any additional claim or assessment. Elmenco and the Subsidiaries have paid or made adequate provision in the Balance Sheet for all taxes payable on or prior to and with respect to all periods ending prior to the date thereof. Neither Elmenco nor any of the Subsidiaries have any liability for any taxes, interest or penalties of any nature whatsoever, other than those shown on the Balance Sheet and other than liabilities for taxes which may have accrued since the date thereof in the ordinary course of business. The federal tax returns of Elmenco and the Subsidiaries have been audited for all years to and including the fiscal year ended May 31, 1971. There shall be no liability hereunder for any additional taxes payable resulting from or attributable to the increase in valuation of any assets reflected on the Financial Statements.

1.19 Except as set forth in Schedule 1.19, there are no threats of strikes, work stoppages or demands for collective bargaining by any union or labor organization, against or including Elmenco or any Subsidiary; no grievances, disputes or controversies with any union or any other organization of the employees of Elmenco or any Subsidiary; and no pending or threatened arbitration proceedings involving an employment grievance, dispute or controversy.

1.20 Neither Elmenco nor any of the Subsidiaries are a party to or otherwise bound by any contract, commitment or undertaking (contractual or otherwise) which is adverse

to the business, properties or assets of Elmenco or any Subsidiary.

1.21 No representation or warranty hereunder, and no document, instrument, certificate or schedule furnished pursuant hereto or in connection with the transaction contemplated hereby, contains any untrue statement of a material fact, or omits to state a material fact necessary to make the statements or facts contained herein or therein not misleading.

1.22 Neither Elmenco nor any Subsidiary has filed a consent of the type authorized by Section 341(f) of the Internal Revenue Code of 1954, as amended.

1.23 Set forth in Schedule 1.23 annexed hereto and made a part hereof is a true and complete list of the names of each bank in which Elmenco or any Subsidiary presently has an account or safe-deposit box and the names of all persons presently authorized to draw thereon or have access thereto.

1.24 No conflict exists with rights of others in respect of patents, trademarks, trade names or copyrights now used in the conduct of the business of Elmenco and its Subsidiaries or in respect of trade secrets, formulae, processes, designs or know-how used in the conduct thereof. Use of Elmenco's and the Subsidiaries' machinery and equipment and processes used in connection therewith are not in violation of or subject to any patent, license or other right of any person or subject to payment of any royalty or any fee and there exists no claim of such a violation or of any limitation in connection therewith.

1.25 All of the foregoing representations and warranties shall be true, accurate and complete on and as of the "Effective Date" of the merger, as such term is defined in Paragraph 3 below.

2. Merger

2.1 On the Effective Date, Elmenco shall be merged into IECONN which shall be the Surviving Corporation under the name The Electro Motive Manufacturing Company, Incorporated. The separate existence of Elmenco shall cease and IECONN shall continue to exist as a corporation created and governed by the laws of the State of Connecticut and the Surviving Corporation shall possess and enjoy all the rights, privileges, immunities, powers, purposes and franchises, as well of a public as of a private nature, and shall be subject to all of the restrictions, disabilities and duties of each of the Constituent Corporations; all of the property, real, personal and mixed, and all debts due to Elmenco on whatever account, as well as stock subscriptions and all other things in action of or belonging to Elmenco shall be vested in the Surviving Corporation; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectively the property of the Surviving Corporation as they were of Elmenco and the title to any real estate vested by deed or otherwise in Elmenco

shall not revert or be in any way impaired by reason of this merger, provided that all rights of creditors and all liens upon any property of Elmenco shall be preserved unimpaired, and all debts, liabilities and duties of Elmenco shall thenceforth attach to and may be enforced against the Surviving Corporation to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

2.2 The Certificate of Incorporation of IECONN is hereby amended, effective on the Effective Date, by changing Article FIRST thereof so as to read in its entirety as follows:

"The name of the corporation is Electro Motive Manufacturing Company, Incorporated."

On the Effective Date, the Certificate of Incorporation of IECONN, as hereby amended, shall be the Certificate of Incorporation of the Surviving Corporation.

2.3 The By-Laws of IECONN in effect at the Effective Date shall continue in force and be the By-Laws of the Surviving Corporation until the same shall thereafter be altered, amended or repealed in accordance with the Certificate of Incorporation, such By-Laws and applicable law.

2.4 The Directors of the Surviving Corporation shall be the Directors of IECONN at the Effective Date, each to hold office until his successor has been elected and qualified.

2.5 The officers of the Surviving Corporation

shall be the officers of IECONN at the Effective Date, each to hold office in accordance with the By-Laws of the Surviving Corporation.

3. Effective Date of Merger

The Effective Date of the merger shall be that date upon which there is filed in the office of the Secretary of State of the State of Connecticut a copy of the Agreement which filing shall be made simultaneously with or immediately after but on the same day as the closing of this transaction. The closing of this transaction shall be held at such place as shall be determined by IEC, on the third business day following the receipt by IEC of the "Certified Financial Statements" (as such term is defined in Paragraph 5.2 below) or, if Elmenco shall dispute the Certified Financial Statements, then on the third business day following resolution of such dispute, or on such other date and at such other place as the parties hereto shall mutually agree upon, provided, however, that in the event that each of the conditions set forth in Paragraph 6 of the Agreement shall not have been satisfied or waived by the party for whom such condition shall have been given, the closing shall take place on the third business day following the satisfaction or waiver of all such conditions, or on such other date as the parties hereto shall mutually agree upon.

4. Effect of Merger and Payment

4.1 Each share of IECONN stock outstanding on the Effective Date and all rights in respect thereof shall continue to be outstanding and shall represent one share of stock of the Surviving Corporation.

4.2 The holder of each share of Elmenco Stock (i) who shall not have objected to the merger and demanded payment of the value of his shares in accordance with the applicable provisions of the corporate law of the State of Connecticut and (ii) who shall have surrendered the certificate theretofore representing such share of Elmenco Stock shall receive in exchange therefor the amounts and in the manner referred to in Paragraphs 4.2.1 and 4.2.2 below. Until so surrendered, each outstanding certificate which, prior to the Effective Date, represented shares of Elmenco Stock shall, after the Effective Date, be deemed for all corporate purposes not to evidence the ownership of any shares of Elmenco, IECONN or the Surviving Corporation but shall be deemed solely to evidence the right to receive payments, without interest, in accordance with this Paragraph 4.

4.2.1 From and after the Effective Date but in no event prior to the receipt by IECONN of the proceeds from the financing referred to in Paragraph 6.1.6 below, each such holder shall be paid the sum of Eighteen Hundred ($1,800.00) Dollars per share for each share of Elmenco Stock surrendered by certified or bank cashier's check plus an amount equal to six percent per annum on such stockholder's pro rata share of $8,000,000 from June 1, 1973, to the Effective Date.

4.2.2 In addition to the amount paid to each such holder pursuant to Paragraph 4.2.1, concurrently therewith there shall be deposited into an Escrow Fund ("Escrow Fund") in respect of each such holder for each share of Elmenco Stock so surrendered the sum of $265.58223. The Escrow Fund shall be deposited in an account the joint name of IEC, on one hand and the firm of Apter, Nahum and Lenge (the "Agent") on the other established as soon as reasonably practicable after the Effective

Date in a commercial bank or banks of good standing in the State of New York and shall be administered, invested, reinvested and managed and withdrawn only upon jointly executed instructions to such bank or banks bearing the joint signature of a member of the firm constituting the Agent and a duly authorized officer of IEC. The Escrow Fund shall be applied in the manner provided in Paragraph 7 below.

4.3 The shares of Elmenco stock of holders who shall have objected to the merger and demanded payment of the value of their shares shall, after the Effective Date, be deemed for all corporate purposes not to evidence the ownership of any shares of Elmenco, IECONN or the Surviving Corporation, but shall be deemed solely to evidence the right to receive payments in accordance with the applicable provisions of the corporate law of the State of Connecticut.

5. Covenants of Elmenco Prior to Effective Date

5.1 Elmenco will submit and recommend the merger of Elmenco into IECONN to its stockholders at a special meeting thereof to be duly called and held on the earliest practicable date. By their execution of this agreement, Julius Apter, Joseph Flanzer and John Binder agree to vote in favor of the merger.

5.2 As soon as practicable after the date hereof, IECONN shall cause to be conducted and Elmenco shall authorize and permit the conduct of an audit of the books and records of Elmenco and the Subsidiaries as of the close of business on February 28, 1973 by Peat, Marwick, Mitchell and Co., independent certified public accountants ("Peat, Marwick"). Such audit shall include the preparation of a consolidated balance sheet of Elmenco and the Subsidiaries at February 28, 1973 and related

consolidated statements of earnings, retained earnings and changes in financial condition for the nine month period then ended, all of which shall be certified to by Peat, Marwick as having been prepared in accordance with generally accepted accounting principles consistently applied (the "Certified Financial Statements"). In the event that Elmenco shall dispute the Certified Financial Statements, such dispute shall be resolved by arbitration in accordance with the rules then obtaining of the American Arbitration Association.

5.3 Between the date hereof and the Effective Date, Elmenco shall and shall cause the Subsidiaries to:

5.3.1 take all action necessary to effectuate this Agreement;

5.3.2 continue to be insured against all risks normally insured against by companies similarly situated and in amounts normally insured;

5.3.3 file all federal, state or local tax returns required to be filed by each of them, respectively, and to pay taxes shown to be due on such returns;

5.3.4 file all reports, schedules and/or returns of any administrative agency of federal, state or local governments required to be filed by each of them, respectively;

5.3.5 conduct their business in their usual and ordinary manner and not enter into any transactions other than in the usual and ordinary course of such business without the prior written consent of IECONN.

5.4 From the date hereof until the Effective Date, Elmenco will not, without the prior written consent of IECONN, grant any right or option to any party to purchase or otherwise acquire any Elmenco Stock or any interest therein or any part thereof or suffer, cause or permit any material adverse change in the financial condition, assets, liabilities, properties or business of Elmenco or any Subsidiary or the title of Elmenco or any Subsidiary to any of its respective properties or assets, and Elmenco will not and will not suffer, cause or permit any Subsidiary to:

5.4.1 issue or sell any stock, notes, bonds or other corporate securities, or any option to purchase the same or enter into any agreement with respect thereto;

5.4.2 declare, set aside or make any dividend or other distribution on its capital stock or redeem, purchase or acquire any shares thereof or enter any agreement in respect of the foregoing, except that Elmenco may declare, set aside and make payment of a dividend of $3.00 per share to holders of record of the capital stock of Elmenco on March 31, 1973;

5.4.3 incur or pay any obligation or liability (absolute or contingent), except current liabilities and obligations incurred in the ordinary course of business;

5.4.4 incur any damage, destruction or similar loss, whether or not covered by insurance, materially affecting its property or business;

5.4.5 sell, assign or transfer any of its tangible assets or any patent, trademark, trade name, copyright, license, franchise or other intangible assets or property except in the ordinary course of business;

apply the Disciplinary Rules of the Code of Professional

5.4.6 mortgage, pledge, grant or suffer to exist any lien or other encumbrance or charge on any of its assets or properties, tangible or intangible;

5.4.7 waive any rights of any value or cancel any debts or claims;

5.4.8 make any changes in compensation payable to officers or directors or any material increase in compensation payable to other employees, other than in accordance with previously established business practices;

5.4.9 enter into any transactions other than in the ordinary course of business; or

5.4.10 engage in any transaction with its stockholders or any of them or with any corporation owned or controlled by any of them.

5.5 Between the date hereof and the Effective Date, IECONN shall have the right to make such investigation of the properties, plants, business and financial condition of Elmenco and the Subsidiaries as it deems necessary or advisable. In order to permit such investigation, Elmenco shall grant to IECONN and its agents and representatives all reasonable access to Elmenco's and the Subsidiaries' premises, books and records and Elmenco will furnish IECONN with financial and operating data and other information with respect to the business and properties of Elmenco and the Subsidiaries as IECONN shall from time to time reasonably request. In the event that this agreement is not consummated, IECONN and IEC shall keep confidential any information (unless readily ascertainable from public or published information or trade sources) obtained from Elmenco concerning the properties,

operations and business of Elmenco and the Subsidiaries and shall return to Elmenco any statements, documents or other written information obtained from Elmenco and the Subsidiaries in connection with this agreement.

6. Conditions to Effectiveness of Merger

6.1 The obligation of IECONN to complete the merger shall be subject to the satisfaction of the following conditions, or the waiver thereof by IECONN:

6.1.1 Each of the agreements and covenants of Elmenco to be performed on or before the Effective Date pursuant to the terms hereof shall have been duly performed.

6.1.2 The representations and warranties of Elmenco set forth in this Agreement shall have been true when made and shall be true on and as of the Effective Date. Counsel to, and the accountants for IECONN shall be satisfied, upon reasonable investigation of Elmenco's and the Subsidiaries' corporate proceedings and records, that the representations and warranties of Elmenco are, on their face, accurate and correct.

6.1.3 The net worth at February 28, 1973 of Elmenco and the Subsidiaries as shown by the Certified Financial Statements shall not be less than $7,500,000.

6.1.4 No injunction or restraining order shall be in effect to forbid or enjoin the consummation of the agreement.

6.1.5 At the closing, Elmenco shall have delivered to IECONN:

6.1.5.1 The written opinion of counsel to Elmenco, dated as of the Effective Date, stating their opinion that

(i) Each of Elmenco and the Subsidiaries is a corporation duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation and Elmenco has a duly authorized capital stock consisting of 3,879 shares of Common Stock, par value $10.00 per share, of which 3,873 shares are duly issued and outstanding;

(ii) Each of Elmenco and the Subsidiaries has the corporate power to own and hold the respective property held by it and to carry on its respective business as such is now being conducted;

(iii) The Elmenco Stock and the outstanding capital stock of the Subsidiaries have been validly issued and are fully paid and non-assessable;

(iv) All actions and proceedings required by law or this Agreement to be taken by Elmenco at or prior to the Effective Date in connection with this Agreement and the transaction provided for herein have been duly and validly taken;

(v) To the best of such counsel's knowledge, there is no litigation or other proceeding pending or threatened in writing against Elmenco or the Subsidiaries or to which Elmenco or any Subsidiary is or would be a party which would have an adverse effect on the business or property of Elmenco or the Subsidiaries or on the ability of Elmenco to perform its obligations hereunder.

6.1.5.2 Written agreements executed by Messrs. Joseph A. Flanzer, Philip Bein, John J. Sinder, Irving Bein, J. Kevin Foley, Arthur Evans, Saul Lewis, Joseph Regan, Herbert Segar, Richard Bergeror, Joseph Lusky, and Ernest Gootman, in form and substance satisfactory to IECONN, providing, without limitation, that each of such persons will not directly, or indirectly, own, manage, operate, join, control, participate in, invest in or otherwise be connected with, in any manner whether as an officer, employee, partner, investor or otherwise, any business entity which is engaged in the importation, manufacture, design, sale or marketing of electronic components in competition with Elmenco or any of the Subsidiaries or the Surviving Corporation.

6.1.6 Elmenco shall have cooperated with IECONN and IEC to enable IECONN to obtain the financing necessary to consummate this transaction and IECONN and IEC shall have concluded all arrangements in respect of, and shall have obtained such financing.

6.2 The obligation of Elmenco to close hereunder shall be subject to the satisfaction of the following conditions, or the waiver thereof by Elmenco:

6.2.1 No injunction or restraining order shall be in effect to forbid or enjoin the consummation of this agreement.

6.2.2 At the closing, IECONN shall have delivered to the Agent evidence satisfactory to the Agent that IECONN has concluded all arrangements in respect of the financing referred to in Paragraph 6.1.6 above and that IECONN will receive the proceeds from such financing to enable it to make the payments in the manner and to the extent required in Paragraph 4 above.

7. Indemnifications

7.1 IEC, IECONN and the Surviving Corporation (the "Indemnified Party") and each of them shall be indemnified, in the manner provided below, against, for and in respect of any and all damages, losses, obligations, liabilities, claims, encumbrances, deficiencies, costs and expenses, including, without limitation, reasonable attorney's fees and other costs and expenses incident to any suit, action, investigation, claim or proceeding (all hereinafter referred to collectively as "Losses") suffered, sustained, incurred, or required to be paid, by any of them by reason of any breach or failure of observance or performance of any covenant made by Elmenco or relating to or arising out of any representation, warranty, covenant, agreement or commitment being untrue or incorrect in any respect or arising from redemption by Elmenco for shares of its capital stock; provided, however, that (a) all liability under this Paragraph with respect to any loss shall be payable out of and shall not exceed the balance of the Escrow Fund then remaining at the time of such loss and (b) the first $400,000 of Losses shall be paid by the Surviving Corporation or IEC and shall not be a charge against the Escrow Fund.

7.1.1 If any claim is asserted to which the indemnifications contained in this Paragraph shall apply, or to which an Indemnified Party proposes to assert that these indemnifications apply, then, on or before the 30th calendar day after the assertion of the claim, the Indemnified Party shall give notice of the claim to the Agent. The omission to so notify the Agent shall eliminate any liability for indemnification which otherwise might exist with regard to such claim.

7.1.2 The Agent shall have the right upon giving notice to the Indemnified Party on or before the tenth

calendar day after his receipt of notice of the claim referred to in Paragraph 7.1.1, to join in the defense of the claim, through IEC's attorney, or an attorney satisfactory to IEC, the expenses of which participation shall be payable out of the Escrow Fund. If the Agent fails to give such notice within the specified time, he shall be deemed to have elected not to join in the defense of the claim.

7.1.3 If the Agent elects to join in the defense:

(i) the Indemnified Party agrees to cooperate and make available all books and records as may be required in connection with the defense;

(ii) the Indemnified Party shall have the right to conduct the defense, with participation by the Agent as aforesaid;

(iii) the Indemnified Party shall have the right to compromise and settle the claim with, and only with, prior consent of the Agent, which consent shall not be unreasonably withheld;

(iv) the Agent shall have the right to compromise and settle the claim with, and only with, the prior consent of the Indemnified Party, which consent shall not be unreasonably withheld; and

(v) all persons entitled to any interest in the Escrow Fund shall be bound by any ultimate judgment or settlement as to the existence and amount of the claim, and the amount of the judgment or settlement shall be conclusively deemed, for all purposes of this Agreement to be liability on

for the estate--not for Mr. Apter. It is the estate's

account of which the Indemnified Party is entitled to be indemnified.

7.1.4 If the Agent does not elect or is deemed not to have elected to join in the defense

(i) the Indemnified Party alone shall have the right to conduct such defense;

(ii) the Indemnified Party shall have the right to compromise and settle the claim without the prior consent of the Agent; and

(iii) all persons entitled to any interest in the Escrow Fund shall be bound by any ultimate judgment or settlement as to the existence and amount of the claim, and the amount of the judgment or settlement shall be conclusively deemed, for all purposes of this agreement, to be a liability on account of which the Indemnified Party is entitled to be indemnified.

7.2 In order to provide for the payment to the Indemnified Party of amounts for which it may be entitled to under this Paragraph 7, the Escrow Fund shall be applied from time to time to the extent necessary, in payment of any such amounts. Upon the expiration of 15 months from the Effective Date, there shall be disbursed from the Escrow Fund to the Agent for

distribution to the persons entitled thereto, as their interest may appear, the balance of the Escrow Fund less an amount equal to the sum of all claims asserted by any Indemnified Party pursuant to this Paragraph 7 which shall not theretofore have been disposed of pursuant hereto. Any monies which would have been disbursed from the Escrow Fund to the Agent but for the assertion of a claim shall be disbursed to the applicable Indemnified Party or to the Agent for distribution to the persons entitled thereto upon disposition of such claim and in accordance with the terms of such disposition.

No person shall have any liability to any Indemnified Party except out of and to the extent of the Escrow Fund.

8. Authority of Agent. The holders of the Elmenco Stock shall be deemed to have authorized the Agent to act on their behalf, to receive and disburse payments, to receive and give any notices and otherwise to act on their behalf as contemplated by the provisions of this agreement.

9. General Provisions.

9.1 All of the representations, warranties, covenants and agreements made by the parties to this Agreement shall survive the execution and delivery of this Agreement and the consummation of the transaction contemplated hereunder, but such representations and warranties shall terminate upon the expiration of 15 months from the Effective Date in accordance with Paragraph 7 above.

9.2 In the event that the merger shall not be consummated, each of the parties hereto shall pay all expenses incurred by it or them incident to preparing for, entering into and carrying into effect the Agreement.

9.3 Any notice, report, demand or payment required, permitted or desired to be given pursuant to any of the provisions of this Agreement shall be deemed to have been sufficiently given or served for all purposes if sent by certified or registered mail, return receipt requested, and postage prepaid as follows:

If to IFC and IECONN:

316 South Service Road
Melville, Long Island, New York

with a copy to Messrs. Golenbock and Barell, 60 East 42nd Street, New York, New York 10017.

If to Elmenco:

c/o Julius Apter, Esq.
Apter, Nahum and Lenge
101 Pearl Street
Hartford, Connecticut

Any of the foregoing parties may at any time and from time to time changes the address to which notice shall be sent hereunder, by notice to the other parties given under this Paragraph. The date of the giving of such notice shall be the date of the posting of the mail.

9.4 Each of the parties covenants and represents to the other that there are no claims for brokerage commissions or finder's fees in connection with the negotiation of this Agreement and the performance of the transactions contemplated hereunder resulting from any action taken by it. Each of the parties agrees to exonerate, indemnify and hold harmless the other in respect of any and all losses sustained by the other as a result

of the liability to any broker or finder on the basis of any arrangement, agreement or acts made by or on behalf of such party with any other person or persons whatsoever.

9.5 Each of the parties covenants and represents to the other that from time to time, as and when requested by the Surviving Corporation or by its successors or assigns, they and their proper officers and directors will execute and deliver or cause to be executed and delivered, all such deeds and instruments, and will take or cause to be taken all such further or other action, as the Surviving Corporation may deem necessary or desirable in order to vest in and confirm to the Surviving Corporation title to and possession of all of the property and rights of the Constituent Corporations and to otherwise carry out the intent and purposes of this Agreement. The Surviving Corporation will pay the customary 1973 Christmas bonus of Elmenco.

9.6 This Agreement constitutes the entire agreement among the parties hereto with respect to the subject matter hereof. The representations, warranties, covenants and agreements set forth in this Agreement and in any financial statement, schedule or exhibit delivered pursuant hereto, constitute all of the representations, warranties, covenants and agreements set forth in this Agreement and in any financial statement, schedule or exhibit delivered pursuant hereto, constitute all of the representations, warranties, covenants and agreements among the parties hereto and upon which the parties have relied and no change, modification, addition or termination of the Agreement or any part thereof shall be valid unless in writing and signed by or on behalf of the party to be charged therewith.

9.7 No waiver of the provisions hereof shall be effective unless in writing and signed by the party to be charged with such waiver. No waiver shall be deemed a continuing waiver or waiver in respect of any subsequent breach or default, either of similar or different nature unless expressly so stated in writing.

9.8 The headings or captions under paragraphs of this Agreement are for convenience and reference only, and do not form a part hereof, and do not in any way modify, interpret or construe the intent of the parties or affect any of the provisions of this Agreement.

9.9 This Agreement shall bind and inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors and assigns.

9.10 In the event that the closing does not occur on or before July 31, 1973, unless such date shall be extended upon the agreement of IECONN, Elmenco and IEC, this Agreement shall be terminated and neither party shall have any obligation to the other.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed as of the date and year aforesaid.

ACCEPTED AND AGREED
TO AS TO PARAGRAPH 5.1

S/ Julius Apter
JULIUS APTER

S/ Joseph A. Flanzer
JOSEPH FLANZER

S/ John J. Sinder
JOHN SINDER

IECONN, INC.

By: S/ Benjamin B. Grossman, Pres.

THE ELECTRO MOTIVE MANUFACTURING COMPANY, INCORPORATED

By: S/ Joseph A. Flanzer, Pres.

INTERNATIONAL ELECTRONICS CORPORATION

By: S/ Benjamin B. Grossman, Pres.

RE: IECONN-ELMENCO-IEC AGREEMENT

SCHEDULE 1.19

Except that a hearing was held before the National Labor Relations Board to determine the extent of the bargaining unit of the employees in South Carolina. No decision has been received as of this date.

MEMORANDUM OF DECISION ON PLAINTIFFS' MOTION TO DISQUALIFY DEFENDANTS' ATTORNEYS

By this motion the plaintiffs seek an order disqualifying Julius Apter and any member of the law firm of Apter, Nahum & Lenge from participation in the court proceedings of this lawsuit as counsel for any of the defendants.

I.

Certain facts not immediately relevant to the merits of the suit, but which form the basis for the motion, have been presented to the court by affidavits, and these are not in dispute in any material respect. Only a summary statement of them is necessary to an understanding of the issue raised by the motion.

The lawsuit brought by the plaintiffs seeks damages against several defendants, among whom are Attorneys Julius Apter, and Julius Apter, Morris Apter, and Nicholas Lenge, d/b/a Apter, Nahum & Lenge. The claim is that in the sale of stock of the former Electro Motive Manufacturing Co. to the plaintiffs, the defendants violated the provisions of the federal Securities and Exchange Act and committed acts of

common law fraud and misrepresentation. In the course of the transaction which led to the sale of that stock of Electro Motive to the plaintiffs for more than seven million dollars, the defendant Julius Apter acted as counsel and as the principal negotiator for all stockholders, including himself. Not only was he a stockholder, he was an officer and director of Electro Motive and its attorney. In addition, he was sole trustee for seven trusts that were selling stockholders, and trustee of a principal creditor, which was required to modify its loan obligation as a condition of the sale. In wearing all of the different hats of those several interests, he acted in the appropriate capacity for each of them, actively participating in the negotiations culminating in the sale. The contentions of the plaintiffs are that the course of these negotiations is laced with fraud, artifice, misrepresentation and the like by the defendants, and that at a trial, the defendant Julius Apter will perforce be called upon to testify as a witness with respect to matters material to all of the issues presented by the defendants' denial of misconduct.

II.

Under the foregoing facts, the issue on this motion is whether Julius Apter or any member of the firm of which he is or was a member ought to be permitted to act as counsel at a trial where it is obvious that he will be called to testify as a witness to matters which will be in dispute. While there is no statutory obligation upon the federal courts to

apply the Disciplinary Rules of the Code of Professional Responsibility and Canons of Judicial Ethics of the American Bar Association (1971) in deciding motions to disqualify counsel,[1/] "the courts' inherent power to assure compliance with these prophylactic rules of ethical conduct" is unquestionable. See General Motors Corporation v. City of New York, 501 F.2d 639, 643 n.11; Draganescu v. First National Bank of Hollywood, 502 F.2d 550 (5th Cir. 1974). The local rules of this court explicitly provide: "This court recognizes the authority of the 'Code of Professional Responsibility of the American Bar Association.'" Rule 2(f).

III.

It may safely be said that most courts and members of the legal profession have come to an agreement as to which of the disparate roles of advocate or witness a lawyer should fulfill in the trial of a law suit during which he will be called as a witness on a contested matter. The salutary ethical considerations which justify the rule that an attorney may not testify at the trial of a case which he is conducting as counsel have been fully elaborated in several cases, e.g., United Parts Mfg. Co. v. Lee Motor Products, Inc., 266 F.2d 20 (6th Cir. 1959); Lau Ah Yew v. Dulles, 257

1/ An order denying disqualification is appealable as a "final" order under 28 U.S.C. § 1291, see Silver Chrysler Plymouth Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974) (en banc).

F.2d 744 (9th Cir. 1958); Sears, Roebuck & Co. v. American Plumbing & Supply Co., 19 F.R.D. 329 (E.D. Wis. 1954); Sorrin v. Pacific Finance Corp., 37 F. Supp. 527 (S.D. N.Y. 1941); State v. Blake, 157 Conn. 99, 103 (1968); Jennings Co. v. Di Genova, 107 Conn. 491 (1928). There is no need to restate the extensive discussion in those cases here nor enlarge upon the historical development of the rule which is found in 6 J. Wigmore, Evidence § 1911 (3d ed. 1940). The rationales for the rule are epitomized in Canon EC 5-9 of the Code of Professional Responsibility which provides:

> "Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively."

The Code includes Disciplinary Rules which "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." See Preliminary Statement to the Code, p.1. In this manner the ethical concepts set out in the Code, which are considered necessary to preserve public confidence in the integrity of proceedings conducted in a court of law, have been subdivided into highly specific

and narrowly defined problems. Disciplinary rule DR 5-101(B) provides:

> "A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify: [the exceptions are irrelevant and omitted]." 2/

To assure compliance with this rule of ethical conduct the motion to disqualify Julius Apter and the members of the law firm of Apter, Nahum & Lenge from participating in the conduct of the trial of this case is granted.3/

And it is,

SO ORDERED.

Dated at Hartford, Connecticut, this 27th day of February, 1975.

M. Joseph Blumenfeld
United States District Judge

2/ Before the Canons were cast in language designed for disciplinary enforcement, Canon 19 provided as follows:

> "When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client." ABA, Opinions of the Committee on Professional Ethics and Grievances with the Canons of Professional Ethics Annotated 15 (1957).

3/ The defendant law firm has counterclaimed for legal fees rendered to Electro Motive in connection with the sale. But

3/ cont'd

wholly apart from that, the ethical obligations of all members of a law firm are treated as joint and several. The Supreme Court of Connecticut observed in Jennings Co. v. Di Genova, supra, 107 Conn. at 498-499:

> ". . . we see no legal or logical difference between the position of a partner who is the advocate in the cause and the partner who is a sharer in the fees obtained but who does not appear as an attorney in the conduct of the case. They are each responsible for the litigation. . . . The public will be apt to think that the lawyer, whether he is an active partner in the conduct of the trial and also a material witness, or an inactive partner and a material witness, will be inclined to warp the truth in the interest of his client. If this feeling will be more easily generated in the case of the active partner than in the case of the inactive partner, it will only be a question of degree. In either case, the distrust will be created. The rule of prohibition for the inactive partner, as for the active partner, is for his own protection, not because the court thinks that he, in either case, will in fact often be exposed to temptation, but to avoid the appearance of wrongdoing. Integrity is the very breath of justice." (Emphasis added).

RULING ON DEFENDANTS' MOTION TO DISQUALIFY COUNSEL

Stimulated by the plaintiffs' motion to disqualify a defendant's attorney and his partners at law on the ground that he will be a witness to material matters at the trial (see memorandum of decision filed contemporaneously herewith), the defendants move to disqualify the plaintiffs' trial attorney.

The basis for the motion is found only in the affidavit of Morris Apter, who is named as a defendant in this case. From that it appears that Morris Apter is one of three co-executors of the estate of Samuel Roskin; Donald P. Richter has been employed by the three co-executors to act as counsel in matters connected with the probate of the Roskin estate; and, Donald P. Richter is a law partner of J. Read Murphy, trial counsel for the plaintiffs in this case.

The attempt to inject into that situation a relationship of confidentiality between Mr. Apter as a client and Mr. Richter as his attorney is ingenious, but too remote to be relevant. As it happens, Mr. Richter is engaged on a matter

which cannot possibly have anything to do with the litigation in this case. Furthermore, Mr. Richter is acting as attorney for the estate--not for Mr. Apter. It is the estate's interest, not Mr. Apter's, which is at stake in the processing of the Roskin estate through probate. All of this is spelled out in Mr. Richter's affidavit.

The motion to disqualify J. Read Murphy and any member or associate of his firm is denied.

SO ORDERED.

Dated at Hartford, Connecticut, this 27th day of February, 1975.

M. Joseph Blumenfeld

M. Joseph Blumenfeld
United States District Judge